

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* * * * *
STUDENTS FOR FAIR *
ADMISSIONS, INC., *
Plaintiff, *
*
vs. *
*
PRESIDENT AND FELLOWS OF *
HARVARD COLLEGE, et al, *
Defendants. *
* * * * *

CIVIL ACTION
No. 14-14176-ADB

BEFORE THE HONORABLE ALLISON D. BURROUGHS
UNITED STATES DISTRICT JUDGE
STATUS CONFERENCE

A P P E A R A N C E S

CONSOVOY MCCARTHY PARK PLLC
Ten Post Office Square, 8th Floor
Boston, Massachusetts 02109
for the plaintiff
By: Patrick Strawbridge, Esq.

WILMER CUTLER PICKERING HALE and DORR LLP (Bos)
60 State Street
Boston, Massachusetts 02109
for the defendants
By: Felicia H. Ellsworth, Esq.

Courtroom No. 17
Robing Room
John J. Moakley Courthouse
1 Courthouse Way
Boston, Massachusetts 02210
September 6, 2016
9:30 a.m.

APPEARANCES CONTINUED

WILMER CUTLER PICKERING HALE and DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
for the defendant
By: Daniel Winik, Esq.

LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND
ECONOMIC JUSTICE
61 Batterymarch Street, Fifth Floor
Boston, Massachusetts 02110
for the intervenor defendant
By: Oren M. Sellstrom, Esq.

CAROL LYNN SCOTT, CSR, RMR
Official Court Reporter
One Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377

P R O C E E D I N G S

THE CLERK: This is civil action 14-14176, *Students for Fair Admissions versus President and Fellows of Harvard College*. Will counsel identify themselves for the record.

MR. STRAWBRIDGE: Patrick Strawbridge for SFFA.

MR. SELLSTROM: Oren Sellstrom from the Lawyers' Committee for Civil Rights on behalf of the Student MB.

MS. MADGE: Sara Madge for Harvard.

MS. ELLSWORTH: Felicia Ellsworth on behalf of Harvard.

MR. WINIK: Daniel Winik on behalf of Harvard.

THE COURT: Okay. The reason I jammed this in this week is that this is my law clerk Kelly who has been on this case from the beginning, this is her last week so I wanted to see what we could wrap up while she was still here and we had some institutional knowledge on the case. Monica is starting today. I need to assign a new law clerk to this case. Both of my incoming law clerks went to Harvard. And you went for undergrad and law school; right?

THE LAW CLERK: Yes.

THE COURT: Did Sarah go just law school or did she go undergrad and law school too? She just went to

1 law school; right?

2 **THE LAW CLERK:** I think she went to both.

3 **THE COURT:** All right. So one of them is
4 going to be assigned to the case. Monica tells me this
5 morning that she did some work in the Admissions Office as a
6 freshman essentially opening mail and various ministerial
7 tasks. She would normally be assigned to this just by the
8 way I assign the odd and even cases but because she spent
9 time in the Admissions Office, if you prefer the other law
10 clerk, I'm fine with that.

11 **MS. ELLSWORTH:** I don't have a preference. I
12 don't think that will create an issue in terms of
13 impartiality. I'm fine either way.

14 **MR. STRAWBRIDGE:** If it's low-level work, I
15 doubt it. On the other hand, she's probably going to know
16 some of the people who will be involved in the case and some
17 of the things -- I guess I'm not going to overlay Your
18 Honor's view as to --

19 **THE COURT:** I mean, honestly my assumption was
20 that you would prefer the other law clerk so you --

21 **MR. STRAWBRIDGE:** Maybe that will take all the
22 issues out of it so --

23 **THE COURT:** I mean, I just, I have not had
24 this discussion with her so for all I know she also worked
25 in the Admissions Office. Monica told me this morning so.

1 **MR. STRAWBRIDGE:** I suppose that, I mean, if
2 they both worked in the Admissions Office, then maybe we
3 have to revisit the question; but if there, given, it just
4 seems like be it might be easier --

5 **THE COURT:** No, I don't dispute that. So
6 you're certainly more than welcome to sit in today but I
7 think all things being whole, we'll swap it, okay. It just
8 seems more fair.

9 All right. So that's the first thing.

10 The second thing is I know you still have a motion
11 pending on organizational standing and I just haven't had a
12 chance to look at it so I will get back to that hopefully in
13 the next week or two. I really, we looked at it pretty
14 closely the first time so I don't anticipate making any
15 changes to it but I will go back to it. I just haven't had
16 a chance to do it.

17 On the, I am just trying to --

18 **MR. STRAWBRIDGE:** I just wanted to remind Your
19 Honor, you probably recall this, but you asked us not to
20 respond to their motion for reconsideration.

21 **THE COURT:** Yes.

22 **MR. STRAWBRIDGE:** And I'm happy not to give
23 you any response unless something piqued your interest.

24 **THE COURT:** Yeah, I mean, I just, I haven't
25 looked at their motion thoroughly. I read in when it came

1 in but not much beyond that. I just, I just know we looked
2 at it pretty closely the first time around so we'll -- but I
3 will look at it again.

4 **MS. ELLSWORTH:** That's fine.

5 **THE COURT:** So what I've done is I tried to
6 pick through all these letters that I have and see if I can
7 tee up what all the issues are. If I missed any, you all
8 can let me know before we go but -- so so far Harvard has
9 agreed to and I assume is producing or has produced two
10 years of admissions data. You've asked for an additional
11 six years for eight total; correct?

12 **MR. STRAWBRIDGE:** Correct.

13 **THE COURT:** My reading of *Fisher* says that
14 three years is not enough and that raises the issue what is
15 enough. Kelly who you will probably be glad to see depart
16 after this thinks that you should get all eight. I was
17 thinking more like six. So, but what I would like to
18 understand is how much more burdensome it is to produce
19 years seven and eight. Is it just the same button or --

20 **MS. ELLSWORTH:** It's not. So it depends on
21 which direction we're going. So the year 2020 which is
22 only, the only existing year now until a new cycle starts,
23 it's a totally new platform called Slate which is different
24 from what we've been producing from for the two years that
25 were produced.

1 So going backwards it is, it's not just the push of
2 a button but it is a similar format. Some of the fields
3 won't exist in earlier years, right. Some things were
4 added. Some field names might change but it is easier to go
5 backwards than forward from the administrative --

6 **THE COURT:** So how about this as a compromise.
7 I give you the eight years but only make them go
8 backwards --

9 **MR. STRAWBRIDGE:** That's fine with us. I
10 suppose, I think Harvard had more of an interest in having a
11 more recent year but I think we view pre-employment (ph.)
12 years as more probative anyway.

13 **MS. ELLSWORTH:** We're certainly happy to go
14 backwards. We still think eight is too many and we suggest
15 maybe doing individualized data fields for whatever number
16 of years you might honor and then some -- that you order,
17 excuse me, and some aggregate data back, further back, back
18 eight years. I'm not sure why we need a line item for
19 each --

20 **THE COURT:** I'm definitely going back to six
21 because *Fisher* says three isn't enough and, so it's not
22 going to be, it's going to be between six and eight but what
23 about that six years going backwards with the aggregate data
24 for the seventh and eighth years?

25 **MR. STRAWBRIDGE:** Obviously we prefer eight

1 but six years going backwards is certainly a good start. I
2 guess --

3 **THE COURT:** All right. Let's do this. Six
4 years going backwards, aggregate data for seven and eight.
5 If there is anything in the aggregate data that looks
6 anomalous to you, you can raise it and we'll see about
7 digging deeper into that, okay.

8 **MR. STRAWBRIDGE:** Okay. So just to make sure
9 I understand, we're talking about the six years prior to the
10 years that they've already produced?

11 **THE COURT:** They produced the two most recent
12 years, right?

13 **MR. STRAWBRIDGE:** Right.

14 **THE COURT:** So six years prior, so four years
15 complete data prior and then two years of aggregate data.

16 **MR. STRAWBRIDGE:** Okay.

17 **MS. ELLSWORTH:** So we're producing four more
18 years going backwards?

19 **THE COURT:** Yes.

20 **MS. ELLSWORTH:** And then for aggregate data --

21 **THE COURT:** So you guys can sort out aggregate
22 data. And if it ends up being easier for you to produce all
23 six years in the same way, that's fine too. But I do have
24 concerns about, you know, there is a view, even a view in my
25 chambers that, you know, two complete four-year cycles is

1 what makes the most sense. I'm sort of looking at it less
2 as four-year snapshots as more like individual year
3 snapshots.

4 **MS. ELLSWORTH:** That's certainly how the
5 Admissions Office looks at it.

6 **THE COURT:** So six years seems, six years
7 seems fine to me and I feel like the older, the further we
8 go back kind of the less probative it is; but that seems
9 like a reasonable compromise to me, six years going
10 backwards altogether, so it's four more years plus two years
11 aggregate data unless you decide that it's easier to just
12 produce all the data because coming up with some model for
13 the aggregate data might turn out to be more of a pain in
14 the butt than it's worth.

15 **MR. STRAWBRIDGE:** Yeah, I think we will have
16 to work through what's included in that aggregate data. We
17 may have different concepts of what's sufficiently detailed
18 enough although still aggregated versus what's not.

19 **MS. ELLSWORTH:** We can try and work that
20 out --

21 **THE COURT:** Try and work it out. I'll tell
22 you this: If you can't work it out, I'm going to be
23 inclined to just say produce the full eight years because
24 that, it's just not worth spending a lot of time trying to
25 compose a whole different data set. If it's easy to do and

1 it gives you what you're looking for, we'll do it. If not,
2 go with the whole eight. Okay?

3 **MS. ELLSWORTH:** Okay.

4 **THE COURT:** All right. So we'll get back to
5 the database fields after Mr. Sellstrom leaves.

6 All right. So this data about academic
7 performance, so I did go back and look at my transcript and
8 I had initially sort of suggested that I was inclined to let
9 you dig into that. And now upon further reflection and
10 after reading *Fisher* I don't see how it's actually relevant.
11 I don't see that -- unless, unless you can make an argument
12 to me that Harvard's reasons for affirmative action are to
13 have some sort of impact on academic performance and I don't
14 think that that is the purpose of their affirmative action
15 program so I don't think that academic performance is
16 relevant to the analysis.

17 **MR. STRAWBRIDGE:** So, a couple of responses to
18 that.

19 I don't know and I think it's way too early in the
20 case to know what all of Harvard's reasons are for its
21 affirmative action programs and so I think it's premature to
22 just determine that it has no relevance or that we
23 understand what the purpose of its use raises. So I think
24 it's premature to kind of make an assessment on that.

25 Secondly, I would just refer the Court to the

1 language in *Fisher II* which specifically notes the
2 University's ongoing need to, among other things, quote,
3 Identify the affects, both positive and negative, of the
4 affirmative action measures the University deems necessary
5 And what's happening once these students are admitted, what
6 their retention rate is like, are they staying in the majors
7 they were admitted in? What's happening with respect to the
8 performance in the field is highly relevant as to whether or
9 not the use of race is achieving the purported goals.

10 **THE COURT:** Well, they say, I mean, they say
11 the purported goals are a diverse class regardless of how
12 all of those people performed, unless they're dropping out I
13 guess.

14 **MR. STRAWBRIDGE:** I mean, that's relevant.

15 **THE COURT:** What do you think about that? I
16 don't -- go ahead.

17 **MS. ELLSWORTH:** I mean, I think you sort of
18 accurately encapsulated Harvard's position and goals here
19 which is, as you said, not related to academic performance
20 necessarily but a diverse campus community and diverse
21 student body so that is the academic goal that Harvard is
22 attempting to achieve with race-conscious admissions. So
23 how individual people do or even how in the aggregate people
24 do academically or in their majors, Latin Honors, et cetera,
25 is sort of irrelevant to Harvard's goal; right.

1 **THE COURT:** So what if you, what if, you know,
2 some enormous percentage of the candidates in a certain
3 program drop out, so then your class is a lot less diverse
4 in year four than it was in year one.

5 **MS. ELLSWORTH:** I mean, the graduation rates
6 in the aggregate is something I think we can probably
7 produce. We're not -- we're happy with our graduation rates
8 so that's --

9 **THE COURT:** Okay. So let's do that. Let's
10 start with that.

11 **MR. STRAWBRIDGE:** Your Honor, I just wanted to
12 be clear also because I think this may address all of the
13 concerns that you have.

14 Our request at the moment, you've agreed to limit
15 it to only aggregate academic performance across, you know,
16 ethnicity because we're not interested in getting individual
17 student performance. We don't care how individual students
18 perform. But if they're using race, we'd like to see
19 whether, you know, we ought to care about what happens on
20 graduation day.

21 **THE COURT:** All right. So let's go with the
22 aggregate data on graduation day. I am way less concerned
23 with majors changing, et cetera, et cetera; but if the point
24 is a diverse class and the class ends up way less diverse on
25 the last day than that is on the first day, that might be

1 something that is relevant.

2 **MR. STRAWBRIDGE:** I mean, is there anything
3 short of, I mean, I guess when we talk about graduation
4 there's also things like academic suspension and transfer
5 and that sort of stuff, not within majors but transferring
6 out of Harvard.

7 **THE COURT:** If they transferred out, they're
8 not going to graduate.

9 **MR. STRAWBRIDGE:** Okay. So we're looking at
10 just graduation rates by ethnicity as directed by Harvard --

11 **THE COURT:** Yes. If there is some other
12 demographic that you're interested in that they can easily
13 put their hands on, that's fine too but --

14 **MR. STRAWBRIDGE:** All right. I'd like to
15 think about that. I would just like to, if in the course of
16 discovery we find other purported bases for the use of
17 race --

18 **THE COURT:** If you find out that their view,
19 that their goal is to whatever, that's somehow related to
20 academic permanence, then come back.

21 **MR. STRAWBRIDGE:** Okay. All right.

22 **MS. ELLSWORTH:** And to clarify, Your Honor,
23 the graduation rates aggregate by race for what time period?

24 **THE COURT:** Let's do that same, let's do the
25 same eight years we've been talking about. That's aggregate

1 data.

2 **MR. STRAWBRIDGE:** Yeah, the only caveat I have
3 about that is obviously for four years we don't have
4 graduation statistics so I'd like to maybe have them for the
5 last eight years for which they have a graduation rate.

6 **THE COURT:** Do you have any problem with that?

7 **MS. ELLSWORTH:** I'm just trying to think. So
8 that's going back to --

9 **THE COURT:** I'm actually not, I don't want to
10 extend past that eight years we already talked about. I'm
11 already as far back as I want to go so let's do it that way
12 and see where we are.

13 **MR. STRAWBRIDGE:** All right.

14 **MS. ELLSWORTH:** And we'll supplement as the
15 class graduates.

16 **THE COURT:** Or if there is some, if we look at
17 the data and there is something that suggests a pattern or
18 an anomaly in the data, whatever, we can go back and revisit
19 that.

20 ESI custodians. All right. So Harvard has agreed
21 to produce 11. SFFA is looking for 25. I think the North
22 Carolina case agreed to 24; right?

23 **MS. ELLSWORTH:** I think that was, my
24 understanding was that was an initial proposal. I don't
25 know, you would know more about it than me.

1 **MR. STRAWBRIDGE:** That was North Carolina's
2 initial proposal.

3 **THE COURT:** How many have been agreed to
4 there?

5 **MR. STRAWBRIDGE:** We have agreed to those 24.
6 We actually have an exploratory deposition in a couple weeks
7 and we reserved the right to request additional ones --

8 **THE COURT:** All right. Just an act of sheer,
9 sheer, I don't want to call it "laziness" but "expediency,"
10 I'm going to give you the same 24 that North Carolina has.

11 **MR. STRAWBRIDGE:** You're going to leave it to
12 us to --

13 **THE COURT:** If you can't sort it out, come
14 back but -- come back but that's where we're going to start.

15 **MR. STRAWBRIDGE:** Okay. I hope that we can
16 sort it out.

17 **THE COURT:** The history of Jewish
18 discrimination at Harvard. No.

19 **MR. STRAWBRIDGE:** May I just, if I may just
20 inquire as to why -- the current admissions process is an
21 offshoot of -- the history of discrimination is relevant to
22 our claim for invidious discrimination.

23 **THE COURT:** History is old and there has been
24 many miles between the history and now. It just seems very
25 unlikely to reveal probative information in this case.

1 **MR. STRAWBRIDGE:** So, I mean, I guess -- I'm
2 struggling a little bit because when we come back with our
3 invidious discrimination, you know, argument at summary
4 judgment and/or a trial, we're going to be -- there is a
5 burden upon us to raise the question as to whether they have
6 a history of invidious discrimination.

7 **THE COURT:** First of all, I think that what
8 happened then is pretty well documented, right? I mean, I
9 don't even know how you're going to do discovery on this at
10 this point. This is all, like, in the '40s.

11 **MR. STRAWBRIDGE:** I don't think it's all in
12 the '40s. Certainly there are documents that are more
13 recent with respect to --

14 **THE COURT:** '50s? I mean, I don't think we
15 get to the '60s; right?

16 **MR. STRAWBRIDGE:** I'm not entirely sure.
17 There has obviously been a lot of scholarship on it. I
18 don't think that a lot of that documentation is disputed.
19 We would be happy to take a stipulation as to the fact that
20 it happened, it was a long time ago but the facts aren't
21 disputed.

22 To the extent that they're disputing the facts of
23 the history of discrimination, we'd like to be able to have
24 some ability to bring documents forth. And if we can't get
25 those documents from public sources, Harvard is the source

1 of letters that their dean was writing to alumni. This is
2 where the holistic admissions process comes from. I don't
3 think it's entirely irrelevant. I agree, like a lot of it
4 isn't in dispute and we ought to be able to stipulate to it
5 but Harvard hasn't offered to do that and failing that I
6 need access to these letters if they're not in public
7 sources.

8 **THE COURT:** See what is out there. I mean, I
9 just think this is so old and so remote and so, it's going
10 to be so hard to link to what's happening now anyway that is
11 going to, that gives probative evidence, I just think it is
12 a red herring time suck.

13 What do you think?

14 **MS. ELLSWORTH:** I agree.

15 **THE COURT:** Is that how you would have phrased
16 it, "time suck"?

17 **MS. ELLSWORTH:** You took the words right out
18 of my mouth.

19 (Laughter.)

20 **THE COURT:** All right. Prior allegations of
21 Asian discrimination. So Harvard is agreeing to two years.
22 SFFA wants more. How much more are you looking for?

23 **MR. STRAWBRIDGE:** Well, I mean, I think there
24 are different categories, right. Like, I don't want email
25 going back 20 years of when someone complained about the

1 fact that they didn't get in but I do think that when
2 there -- there was a DOE investigation in the '80s, for
3 example, that we referred to in one of our letters. And I
4 think that, you know, the results of that information
5 Harvard has regarding that investigation is probative to our
6 invidious discrimination claim. It is far more recent.

7 There is a newer investigation within the last, you
8 know, two or three years that also looked into those issues
9 so, I mean, anything that they have, you know, I would be
10 completely reasonable in terms of how they identify the
11 documents but I think anything over, you know, going back to
12 that DOE investigation --

13 **THE COURT:** When was the DOE investigation?

14 **MS. ELLSWORTH:** It was 1990, 1988 to '90. The
15 official OCR investigation and then -- I'm not sure what
16 allegations of Asian discrimination you're making precisely.
17 I understand Mr. Strawbridge to be saying he's not asking us
18 to search email but that could take a lot of different
19 forms. If we're talking about the two formal open OCR
20 investigations, that's one thing.

21 **THE COURT:** Certainly the two open OCR
22 investigations they should have. And you're talking about
23 sort of systemic allegations, like sort of group allegations
24 or --

25 **MR. STRAWBRIDGE:** I wouldn't limit it to that

1 but I would be willing to come up with a reasonable way to
2 identify formal allegations. I mean, they obviously have
3 people who have been in the Admissions Office for a long
4 time and whenever people have raised issues at the board
5 level or at the director level, they go beyond this one
6 particular applicant's.

7 Now, I do think the two-year period is relevant
8 for, you know, more -- the search of ESI, for example, the
9 search terms are going to hit on those anyway.

10 **MS. ELLSWORTH:** They should.

11 **MR. STRAWBRIDGE:** So, but for the larger more
12 institutional ones, I think the OCR is a good start but if
13 there is any -- they know better than I do if they've had
14 any internal investigations, if they've ever received
15 complaints that have come through other sources that
16 prompted some kind of level of review or investigation at
17 the department level but --

18 **THE COURT:** Can you figure out how many
19 incidents there were to which Harvard responded at an
20 institutional level? So an investigation and inquiry --

21 **MS. ELLSWORTH:** If I -- okay.

22 **THE COURT:** Not individual students.

23 **MS. ELLSWORTH:** Right. What I'm aware of
24 right now are the two OCR investigations. What we can go
25 and look for in response to this is anything, as you put it,

1 that Harvard responded to on an institutional level, not
2 individual allegations.

3 **THE COURT:** Like board level -- I don't know
4 what "director level" means but -- I don't know what "board
5 level" means.

6 **MR. STRAWBRIDGE:** There's two boards at
7 Harvard, one that says the inside board and the inside board
8 is the Fellows and -- but I guess what I meant is something
9 that comes to their attention. I mean, the senior officials
10 in the Admissions Department have been there since the
11 1980s, anything that has come to the level of their
12 attention that goes beyond individual students ought not be
13 too hard for them to recall.

14 **MS. ELLSWORTH:** We can -- I mean, so we would
15 be looking to see what the Dean of Admission has responded
16 to.

17 **MR. STRAWBRIDGE:** Or the Director.

18 **MR. SELLSTROM:** Or the Director of Admissions.
19 I mean, I think any response from that office would have
20 come from one of those two either way. I'm not sure that's
21 going to allow us to narrow it that much. But if we're
22 talking about not an individual complaint of discrimination
23 but more a systemic complaint, we can look to see other than
24 the two OCR investigations if there are other systemic
25 responses from either the Dean or Director over Admissions.

1 **THE COURT:** Okay. So let's do that.

2 **MS. ELLSWORTH:** I'm sorry, since the 1990s;
3 right? Since the first OCR investigation?

4 **THE COURT:** I think that's far enough; right?
5 From 1990 forward?

6 **MR. STRAWBRIDGE:** I think that's --

7 **THE COURT:** Or the late '80s.

8 **MR. STRAWBRIDGE:** I think that's fine for the
9 search.

10 **THE COURT:** The number of depositions per
11 side. I don't think it's actually ripe because I don't
12 think anyone has taken ten depositions yet; but that being
13 said, I don't think ten depositions per side is going to be
14 enough so what are you looking for, Mr. Strawbridge?

15 **MR. STRAWBRIDGE:** I think our initial proposal
16 was 20. I don't want to take any more depositions than I
17 have to. I've got this case and I've got another case so
18 I'm not looking to add to my work load. I think that, you
19 know, 20 would probably be sufficient. We had carved out
20 third-party depositions. I don't anticipate a tremendous
21 number of third-party depositions but there may be a few.
22 If we're talking about party Harvard depositions, I think 15
23 to 20 is a good starting point. We have 24 custodians.

24 **MS. ELLSWORTH:** So if we're going to -- I
25 guess the ten that we agreed to before which I understand

1 was before a lot of water went under the bridge here was
2 only Harvard. If we're going to up that number, I'm not
3 sure we'd be willing to say only Harvard so 15 Harvard
4 custodians, 20 total, including third parties, and then --

5 **THE COURT:** Let's start with that. I was
6 thinking 15. I hadn't factored in the third parties so
7 let's do that, 15 Harvard and five third party.

8 **MR. STRAWBRIDGE:** Subject to our ability to --

9 **THE COURT:** Yes.

10 **MR. STRAWBRIDGE:** Thank you.

11 **THE COURT:** It just struck me that ten wasn't
12 going to be enough and I'd rather give you more general
13 parameters and have you go off and do it than have to be in
14 here what about this one, what about that one. I think it
15 lets you plan better and I think it will keep us better on
16 the discovery schedule.

17 I think the last thing that I have on my list
18 besides the fields are the confidentiality designations.
19 You want me to review the documents that they're --

20 **MR. STRAWBRIDGE:** I think I have to ask, I
21 don't want you to review -- I wish we could work this out
22 but, really, at this point I think we want some input
23 because I don't think the protective order really provides
24 just how do you want us to put these in front of you. Do
25 you want me to send over a binder? Do you want me to bring

1 them into court one day? Do you want argument on each of
2 the documents?

3 I wish we weren't there but, for an example,
4 they're just sending over aggregate admission statistics for
5 racial groups and they're marking them "attorneys' eyes
6 only." And that's exactly the kind of stuff I thought we
7 talked about earlier that shouldn't be marked "attorneys'
8 eyes only."

9 I don't know what to do at this point other than
10 the fact that we're about to get, you know, a lot of email
11 and I am anticipating a lot of the email is going to be
12 marked "attorneys' eyes only" and it's frustrating our
13 ability to manage the case. I think it's beyond the scope
14 of what's really --

15 **THE COURT:** Who else do you want to have
16 access to these?

17 **MR. STRAWBRIDGE:** I'd like to be able to show
18 one client representative some of the most important
19 discovery in the case.

20 **THE COURT:** When you say "client
21 representative," what kind of person are we talking about?

22 **MR. STRAWBRIDGE:** I'm not sure it matters but
23 obviously Mr. Blum is the primary client representative.
24 I'm not necessarily interested in, you know, disseminating
25 this across the entire membership. I don't necessarily need

1 to do that but the Board and/or Mr. Blum are the people who
2 would be most appropriate to, you know, provide an
3 assessment of our case including the most sufficient
4 evidence and that's what the confidential designation is
5 for.

6 **THE COURT:** Okay. So he is talking about
7 Mr. Blum who is not a student or an applicant or anything
8 like that, which I presume would raise different issues for
9 you. He has to be able to show some stuff to his client. I
10 thought we had agreed that aggregate data would go to the
11 client.

12 **MS. ELLSWORTH:** So the aggregate data that we
13 have produced so far is not, it's not like the aggregate
14 data, it's the one-pagers that are discussed within the
15 Admissions Office throughout the process so it's not like an
16 output of aggregate data. It's a particular document that
17 is used quite intricately in the admissions process and so
18 we think that designating it as highly confidential is the
19 inner workings of the admissions process as well as things
20 that relate to individual students that we have, you know,
21 separate reasons for the AEO designation.

22 **MR. STRAWBRIDGE:** I get the individual
23 students and we've tried to be very accommodating, I think
24 we've made that clear --

25 **THE COURT:** Is this like the daily sheet they

1 sort of send around with what's going on?

2 **MS. ELLSWORTH:** It's not daily but it is --

3 **THE COURT:** Frequent, whatever.

4 **MS. ELLSWORTH:** It's the sheet, it is a sheet
5 that the Dean of Admissions and Director of Admissions look
6 at from time to time during the height of the admissions
7 process.

8 **MR. STRAWBRIDGE:** Yes, exactly. I guess I
9 feel like the inner workings of the Admissions Office is
10 what the entire case is about. I mean, if that's the ground
11 for an attorneys' eyes only designation, then I'm not sure
12 why we have any other designation.

13 **THE COURT:** Well, what I have tried to think,
14 the way I have tried to think about this in my own head, and
15 maybe I have it right and maybe I don't, is that -- I kind
16 of think of Mr. Blum's kid or his neighbor's kids or
17 everybody he knew is going to apply to Harvard, aggregate
18 data that's not going to give those people an advantage in
19 the admissions process he should be able to see but data
20 that gives insight such that he could figure out who is more
21 likely to get in and who wasn't is what I've sort of been
22 driving along in my own head. Not because I think he is
23 going to do that but because that's, when I think about it,
24 that's how I think about it. If it would help a particular
25 person to know this in terms of getting their own kid in, I

1 think that they can mark it "highly confidential;" but if
2 it's aggregate data about who's gotten in, you know, there
3 is more aggregate data that is just a reporting of
4 statistics, that I think they should have. Can we carve
5 that line? Do I have it wrong?

6 **MR. STRAWBRIDGE:** I don't think that line is
7 going to be tenable as the case goes forward and in part
8 because I think that Harvard has a lot, a number of forums
9 and been quite open about the general nature and the
10 workings of its admissions process. I don't think any of
11 the stuff really provides the kind of advantage that Your
12 Honor is concerned about, things like their reader
13 instructions and their instructions to their alumni
14 interviewers. These are pretty widely disseminated
15 documents.

16 Secondly, the confidential designation still
17 protects it from dissemination beyond the people who have an
18 interest in seeing it and we're agreeing to further restrict
19 its dissemination to certain members of our clients who do
20 not have an ongoing stake, you know, with respect to a
21 particular student's admission.

22 But, I mean, theoretically they're going to claim
23 that any comment that any admissions officer ever makes
24 about anyone's file is information that could be used to
25 that scope and we're going to have essentially the entire

1 case tried under seal. I just don't think that's a tenable
2 line to hold.

3 **MS. ELLSWORTH:** I think there is a different
4 question as far as what we do when it comes time to actually
5 put in evidence at trial --

6 **THE COURT:** I agree.

7 **MS. ELLSWORTH:** -- or summary judgment so
8 that, I wouldn't -- I mean, we'll have to figure something
9 out then and we will cross that bridge when we come to it
10 but for present purposes -- and I do think Your Honor is
11 drawing the line correctly. And as an example, the way in
12 which that could be, that line could be abused, you know,
13 the fact that only two people might apply from Montana, to
14 use a random example that is probably not correct, that is
15 hopeful to somebody in Montana or who might send their kid
16 to school in Montana to know that that's, you know,
17 potentially an easier avenue into admissions.

18 So, again, not that Mr. Blum is going to do this
19 but the point is that that's the concern.

20 **MR. STRAWBRIDGE:** It think it's such -- I
21 mean, if they would agree to just let us have one client
22 designation, then I would have less concern at this point in
23 the case but since they've held the line on that even like,
24 I mean, they're going to be able to say this about almost
25 every single document that they produce in the case. I

1 just, it's very difficult for us to get strategic guidance
2 before the trial period and to report what the strength of
3 our case is looking like, how it's shaping up if we're
4 basically just hamstrung from using any document whatsoever
5 even if it contains no information about individual
6 applicants.

7 **THE COURT:** All right. How many, like what's
8 the volume of documents we're talking about here if I was
9 inclined to look at them?

10 **MR. STRAWBRIDGE:** I mean, right knew we could
11 probably limit it to a small binder and that's largely
12 because of the size of the documents as opposed to the
13 number of the documents. When the emails start rolling in,
14 it's going to be a different story but my hope is we can get
15 some real hard and fast guidance that would allow for
16 appropriate designations that would be followed when the
17 emails come in.

18 **THE COURT:** All right. Why don't you, you can
19 give me the binder and you want to give me something that
20 says why you're designating each of those documents as
21 confidential.

22 **MS. ELLSWORTH:** Yeah, I think so. I don't
23 know exactly what's going to be in the binder right now
24 but --

25 **MR. STRAWBRIDGE:** Maybe what we could do, if

1 we can just try to make it easier for everybody, is we can
2 give you a binder and we can essentially give you like, you
3 know, we'll try to limit it to a line or two about why we
4 think the designation is inappropriate and they can give a
5 line or two in response to each document and we could keep
6 it to a reasonable --

7 **THE COURT:** Maybe we will just come and sit
8 here again with the binder and just go through it page by
9 page and then you'll have some idea of how I'm going to rule
10 on these things.

11 **MR. STRAWBRIDGE:** Okay.

12 **THE COURT:** It's hard for me when I don't know
13 what these are.

14 **MR. STRAWBRIDGE:** Yeah. I prefer not to give
15 a binder but if we've got to do that, we've got to do that.

16 **THE COURT:** Is that everything but for the
17 fields?

18 **MS. ELLSWORTH:** The only other issue I have is
19 alumni interviewers.

20 **THE COURT:** Is that ripe at the moment?

21 **MS. ELLSWORTH:** There is a pending discovery
22 request for names.

23 **MR. STRAWBRIDGE:** I think the discovery field
24 discussion will get into this so I think we can probably
25 have it as part of that discussion.

1 **THE COURT:** Okay.

2 (Pause in proceedings.)

3 **MR. SELLSTROM:** Is it time for me to exit?

4 (Laughter.)

5 **MR. SELLSTROM:** Thank you, Your Honor.

6 (Whereupon, Mr. Sellstrom exited the robing room.)

7 (Whereupon, the remainder of the proceedings were
8 sealed and transcribed under separate cover.)

C E R T I F I C A T E

I, Carol Lynn Scott, Official Court Reporter for the United States District Court for the District of Massachusetts, do hereby certify that the foregoing pages are a true and accurate transcription of my shorthand notes taken in the aforementioned matter to the best of my skill and ability.

/S/CAROL LYNN SCOTT

CAROL LYNN SCOTT
Official Court Reporter
John J. Moakley Courthouse
1 Courthouse Way, Suite 7204
Boston, Massachusetts 02210
(617) 330-1377

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